



Misclassification - Independent Contractor vs. Employee

Workers' Compensation and
Unemployment Insurance Programs



Today's Goals

- Provide better understanding of the legal definitions of an employee
- Improve employers ability to distinguish between independent contractors and employees
- Provide information on law changes related to employee classification.

Employee vs. Independent Contractor – Simple truth

- More often than not...
- If the individual working for you does not have any employees...
 - ☞ 99% of the time, they are YOUR employee for the purposes of Workers' Compensation (WC) and Unemployment Insurance (UI) purposes.
- For purposes of WC and UI, an independent contractor is someone you hire, who
 - ☞ performs a job that is not similar or connected to your business, and
 - ☞ who's work you have no direction or control over.

Who is an Employer?

- For Workers' Compensation Program,
 - Technically ... An employer is: any body of persons, corporate or unincorporated, public or private, an owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who by reason of being an independent contractor is not the direct employer of the workers employed there.
 - Can be as simple as ... if an individual performs work for you that would otherwise have to be performed by yourself or an employee, the individual **IS** your employee.




Who is an Employer?

- For Unemployment Insurance Program,
 - Technically ... An employer is an entity who has individuals working for them. There are various tests on whether or not the employer is liable to pay into the unemployment trust fund and whether the wages paid are reportable and taxable.
 - Can be as simple as ...if an individual performs work for you that would otherwise have to be performed by yourself or an employee, the individual **IS** your employee.



Who is an employee?

- Most labor/tax laws assume anyone compensated for work is an employee unless the employer can demonstrate otherwise, or there is a specific exemption in the law.
- The laws were intended to provide WC and UI coverage in most cases



Employee vs. Independent Contractor - Tests

- There are a number of legal tests to determine who is an employee:

- Common Law – IRS

- Right to control/nature of business – VT WC

- Economic Reality Test – FLSA

- Hybrid test – UI's ABC Test



What does all this mean?

- If you are an employer, who has one or more employees, and you hire another “individual”, most likely that individual is YOUR employee.
- To validate such, there are various tests.
- For the purposes of WC and UI, it is imperative that you use the ‘right’ test to avoid misclassification penalties.



WC Program

- Is individual my employee for Workers' Compensation purposes?
 - YES - if the individual has entered into the employment of, or works under contract of service or apprenticeship with you as the employer ...
- There are a few limited exemptions



WC Program Exceptions – Not liable for coverage if:

- Work of a casual nature AND not for the purpose of the employers trade or business
 - Casual work is generally one time in nature and not similar to work done by the employer
- Amateur Sports
- Agriculture employment if farm payroll < \$10,000 per year
- Family member living in employer's house and business is a Sole Proprietorship
- Licensed real estate broker/sales




WC Program Exceptions – Not liable for coverage if: (continued)

- Service in and about a private dwelling
- With approval of VDOL, up to 4 executives of a corporation or LLC
- Sole proprietor or partner owner, if
 - Work is different than work of the person the individual contracts with, AND
 - Individual is in business for self, AND
 - Individual is not treated as employee for income tax, AND
 - Individual controls the means and manner of the work performed, AND
 - There is a written contract expressly waiving coverage.



WC Program - Employee vs. Independent Contractor

- Once its determined employer is providing covered employment, is the worker your employee?
- Ask the following questions:
 1. Did the individual perform services? If yes,
 2. Did you pay the individual wages, remuneration or other compensation? If yes, a “right to control/nature of business” test must be applied.



WC Program – Employee Test

- The worker is only an independent contractor if, the employer meets his or her burden by showing:
 - A. Worker is free from direction and control;
AND
 - B. Worker is doing work that is not a part of or process in the employer's business.



WC Program – No wages exempt

- If an individual is an employee under the WC tests they must be covered with WC insurance even if the wages earned are small or the hours worked are few.
- Sales persons, other than real estate sales persons are considered employees, even if they only receive commissions



UI Program - Employee vs. Independent Contractor

- Is individual my employee for Unemployment Insurance purposes?
- Ask the following questions:
 1. Is the person or entity you hired an “individual”? If yes,
 2. Do they have other workers? If no,
 3. Did the individual perform services? If yes,
 4. Did you pay the individual wages? If yes, the “ABC” test must be applied.

UI Program - “ABC” test

- The worker is an independent contractor only if, the employer meets his or her burden by showing:
 - A. Worker is free from direction and control; AND
 - B. Worker is doing work outside the usual course of the business, or outside the place where the business is conducted; AND
 - C. Worker is independently established in a trade, occupation, profession or business.
- All three prongs of the test must be met to find individual is not your employee



UI Program - “ABC” test additional thoughts

- A. Individual is free from direction and control; examples of this might be:
 - ☐ Individual bids for the job and is paid by the job
 - ☐ Individual completes job with no direction, supervision, or set hours
- B. Individual is doing work outside the usual course of the business, or outside the place where the business is conducted; examples might be:
 - ☐ Individual does work which none of your employees does and for which you do not advertise
 - ☐ Individual does all work at their own facility
- C. Individual is independently established in a trade, occupation, profession or business; examples might be:
 - ☐ Individual has employees of their own
 - ☐ Individual has liable UI account with VDOL
 - ☐ Individual advertises their business services to the general public



UI Program - Wage exemptions

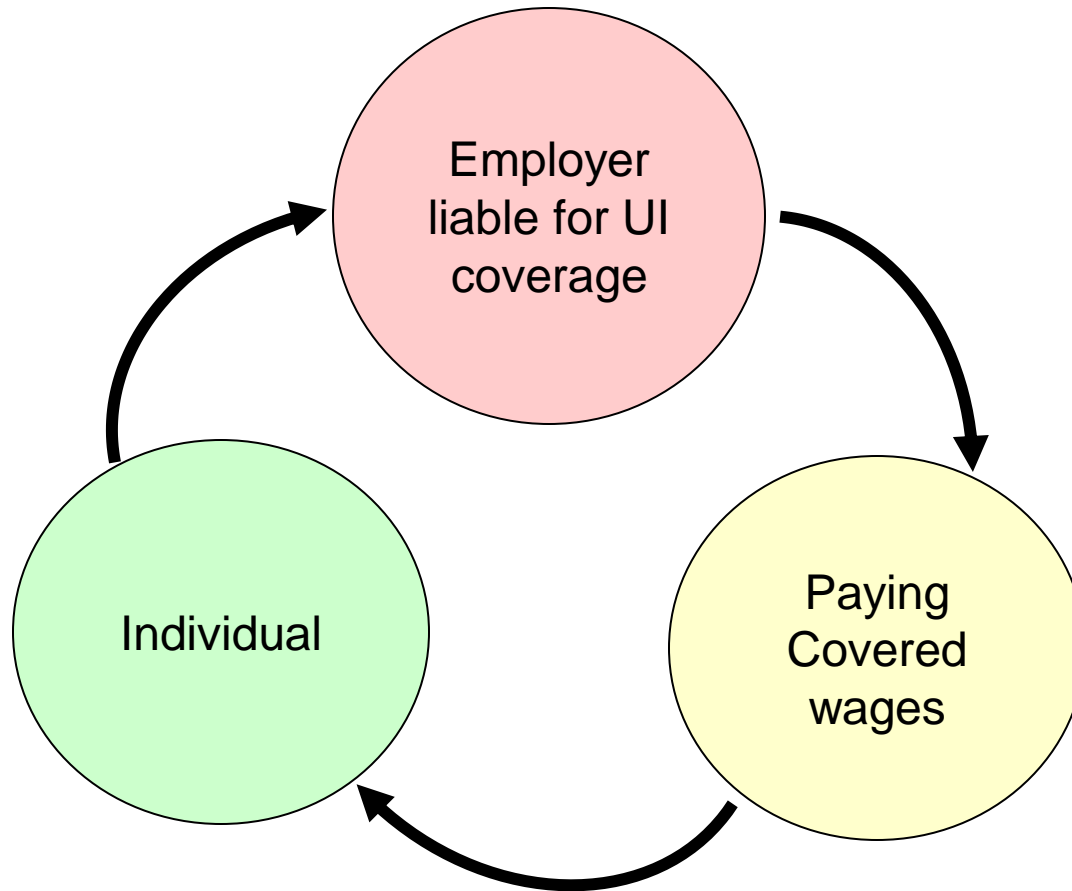
- While a worker may be your employee, certain wages are not useable for determining liability and are exempt for coverage/reporting purposes:
 - Religious/church employment
 - Municipal/Gov-elected officials, legislature & judiciary as well as individuals working on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency
 - Work-study students
 - Insurance sales, if paid by commission
 - Employment authorized under certain VISAs



UI Program - Wage exemptions (continued)

- Any sales for which the State requires a license
- Full time students working at a summer camp (if returning to school)
- Direct sellers (like vacuum cleaner salespersons, home paper delivery, etc)
- Casual employment (\$50 of wages or less, services outside usual course of the business.)

UI Program – Bigger Picture





WC and UI - Employee vs. Independent Contractor

- As you can see, if there is a connection between your business and the “individual”, in most cases the individual is your employee for WC and UI purposes
 - EVEN when the individual believes him or herself to be an independent contractor
- Reminder...
 - “Individual” is one who has no workers
- Side note:
 - For the past several years VDOL has attempted to get law changed to have the same test for both programs



Statutory Employees – W C Only

- If you subcontract a part of or process in your business to another business or company, you may become the statutory employer of that business or company's workers.
- If the direct employer of these employees has covered each of them with workers' compensation, you are not liable to do so.
- However, if the direct employer has not provided coverage, you may be liable to do so; your workers' compensation insurance carrier may charge you for this exposure



Consequence for Misclassification

- As a result of current legislation there has been a huge focus on misclassification – this results from:
 - Legislative Study groups
 - Labor and Employer groups want level playing field
- 2009 legislative session created new penalties, raised existing penalties and allows for debarment from state contracts for employers who misclassify
- Legislation also mandated reporting instances of misclassification and requires collaborative efforts to share information among state agencies



Misclassification Penalties

Act 142 - 2010 Legislative session

- For UI:
 - Up to \$5,000 penalty for each misclassified worker
 - Up to \$5,000 penalty for a willful misstatement
- For WC:
 - Up to \$20,000 fine for willful misstatement
- For Both:
 - Barred from doing business with the state up to 3 years
- In August 2011 Board Rules were approved



What can I do if I have questions?

■ Call VDOL

- Better to get reporting correct now than to be tagged with penalties upon completion of an investigation.
 - If you have questions about whether individuals performing work for your business are classified correctly for UI purposes, call our office below or any of the field representatives throughout the state.
 - If you think your workers may not be properly coded or classified for WC purposes, contact your insurance agent.

■ UI Employer Services – 802-828-4344

■ Workers' Compensation Division – 802-828-2286



Field Contacts Areas

■ WC Investigators

- Burlington: 859-5948
- Rutland: 775-2203
- Newport: 334-3301
- Montpelier: 828-2297

■ UI Field Representatives

- Bennington: 447-2867
- Middlebury: 652-0328
- Rutland: 786-8806

■ UI Field Representatives

- Montpelier: 828-1147
- Morrisville: 888-2542
- Springfield: 885-1411
- Burlington: 951-5147
- St Albans: 863-7480
- Newport: 334-3303

How do I report suspected fraud?


- Providing complete and accurate information is the first step
 - Name, address, and telephone number (if available) of individual(s) involved
 - Dates and locations work was performed
 - The more information you provide, the better our chances are of finding misclassification
 - Application or reporting forms found at www.labor.vermont.gov
- Check our website to see if business has a current WC policy <https://www.ewccv.com/cvs/>
 - Report to us any business that is employing workers and does not have a current WC policy



How do I report suspected fraud?

■ Remember ...

- Information of who filed the report will be kept confidential. Your contact information will only be used in the event we need more information to complete our investigation
- Unless or until EVERYONE is not only concerned, but acting upon fraud, the underground economy will:
 - continue to erode a fair playing field for businesses and workers alike, and
 - contribute to undermining the economy.



Examples for determining ...

Is this individual my employee?

- The Carpenter
- The Truck Driver
- The Catered Event
- The Daycare Center – Substitute
- The Daycare Center – Bookkeeping & Snowplowing/Lawn care
- The Bookkeepers who formed an LLC



Example A – The Carpenter

- A building contractor needs extra help to finish a project so it engages a carpenter, who is in business for himself, to complete part of the project
 - Building contractor facts:
 - Has already been found liable for reporting under the UI program
 - Exercises no direction or control over carpenter; doesn't tell the carpenter how or when to do the work
 - Has other workers performing same or similar functions
 - Carpenter facts:
 - Does not have any employees. For UI purposes is considered to be an “individual”. Having employees is not relevant for WC purposes
 - Did not bid on the job; is fitting the building contractor's job in among other jobs he already has lined up

Example A – The Carpenter

UI-ABC test (<i>Must meet all 3</i>)			WC “two-part” test – (Must meet both)		
A	Right to Control	✓	1.	Right to Control	✓
The Carpenter is sufficiently skilled to operate without supervision, was not involved in the bidding, and works his own schedule. Additionally, the Building Contractor is overall responsible for getting the job done, but does not exercise any control over means/manner of Carpenter's work. Therefore this part of the test are met for UI and WC.					
B	Outside course/places of business	X	2.	Outside course of business	X
Inasmuch as the nature of a Building Contractor's business is such that employing carpenters is essential, this part of the test is <u>not</u> met for UI or WC.					
C	Independently established (UI account and/or other clients before/during/after)	✓			
Even though the Carpenter does not have any employees, he has an established business. Such is demonstrated by the fact he, provides services to many, files tax returns for his business, and advertises regularly. Therefore, this part of the test is met for UI.					

Inasmuch as not all portions of the respective tests are met, worker is the Building Contractor's employee for UI and WC purposes.



Example B – The Truck Driver

- A freight delivery company hires a driver to deliver freight. The driver uses his own truck.
 - Freight delivery company facts:
 - Has already been found liable and has other workers performing same or similar functions
 - Assigned the route/territory
 - Truck driver facts:
 - Has own truck
 - Delivers freight for others

Example B - The Truck Driver

UI-ABC test (<i>Must meet all 3</i>)			WC “two-part” test – (Must meet both)		
A	Right to Control	X	1.	Right to Control	X
Although the Freight company does not exercise any control over means/manner of Truck driver’s work, the Freight company is ultimately responsible for the undamaged delivery of the freight. Therefore this part of the test is not met for UI or WC.					
B	Outside course/places of business	X	2.	Outside course of business	X
Delivering freight is the nature of the Freight company’s business and the route/territory is within the places of the Freight company’s business This part of the test is <u>not</u> met for UI or WC.					
C	Independently established (UI account and/or other clients before/during/after)	X			
Although the trucker owns the truck and the driver delivers for others, he has no employees, is not registered, and does not operate like a business. This part of the test is <u>not</u> met for UI.					

As no parts of either test were met, worker is an employee of the Freight company for UI and WC purposes.

Example C – The Catered Event

- A restaurant agrees to cater an event. It hires college students to work as servers, bartenders and to bus for this one night of work.
 - Restaurant facts:
 - Is a sole proprietor liable under the UI program
 - Student Facts:
 - Some students are under 18 and one is the son of the sole proprietor of the Restaurant
 - Some are exchange students and some have J1 VISAs
 - Bartenders
 - Are regular employees of the restaurant

Example C - The Catered Event

UI-ABC test <i>(Must meet all 3)</i>			WC “two-part” test – (Must meet both)		
A	Right to Control	X	1.	Right to Control	X
The Restaurant owner directs and controls the entire event. Therefore this part of the test is <u>not</u> met for UI or WC.					
B	Outside course/places of business	X	2.	Outside course of business	X
Although this is the first catered event, when the Restaurant accepted the event, it became part of the nature of their business. This part of the test is <u>not</u> met for UI or WC.					
C	Independently established (UI account and/or other clients before/during/after)	X			
As none of these workers is liable or reporting to UI, this part of the test is <u>not</u> met for UI.					

J1 VISA holder wages are exempt from UI, but not from WC. The son of the sole proprietor’s wages are exempt from UI and from WC provided he lives in the proprietors home. There is no casual work exception under UI or WC as the work is for the purpose of the restaurant’s trade or business. All other workers fail all parts for UI and WC purposes and are the Restaurant’s employees.



Example D – Daycare Center

- A day care pays for substitute help when they have to be away

- Daycare facts:

- Is a sole-proprietorship with no employees.
 - Is not currently liable under the UI program

- Substitute facts:

- Is a friend or relative who helps out occasionally for an hour or two when daycare provider has doctor's appointment, etc.
 - Has no employees of their own

Example D – The Daycare Center

UI-ABC test (<i>Must meet all 3</i>)			WC “two-part” test – (Must meet both)		
A	Right to Control	X	1.	Right to Control	X
Although the Substitute may be experienced in child care, they are required to follow the Daycare Center’s “program” and/or any special care instructions for the day, etc. For UI and WC this part of the test is <u>not</u> met.					
B	Outside course/places of business	X	2.	Outside course of business	X
Inasmuch as the nature of the Daycare provider is to take care of children, the Substitute does <u>not</u> meet this part of the test for either UI or WC.					
C	Independently established (UI account and/or other clients before/during/after)	X			
The Substitute is not in business for themselves and therefore does <u>not</u> meet this part of the UI test.					

Inasmuch as the Substitute fails all portions of the respective tests, they are an employee for UI and WC purposes.



Example E – Daycare Center

- A day care pays a bookkeeper and for snowplowing/lawn care services
 - Daycare facts:
 - Is a sole-proprietorship with no employees and is not currently liable under the UI program
 - Does do some check writing and bookkeeping, but has bookkeeper do monthly account reconciliation
 - Bookkeeper facts:
 - Does not have employees and does bookkeeping in their home for others
 - Snowplowing/lawn care facts:
 - Is a sole-proprietorship and does this for several area residents and businesses

Example E – The Daycare Center

UI-ABC test (<i>Must meet all 3</i>)			WC “two-part” test – (Must meet both)		
A	Right to Control	✓	1.	Right to Control	✓
The day care provider exercises no direction or control over the bookkeeper. The snowplow/lawn care person also works without supervision. Therefore for UI and WC this part of the test is met for the bookkeeper and snowplow/lawn care folks.					
B	Outside course/places of business	✓	2.	Outside course of business	✓
Because the Daycare provider is not in the business to do bookkeeping or snowplowing/lawn care, both the bookkeeper and snowplow/lawn care meet this part for both UI and WC.					
C	Independently established (UI account and/or other clients before/during/after)	✓			
The bookkeeper and snowplow/lawn care are established businesses doing this for others and accordingly meet this UI test.					

The bookkeeper and Snowplow/lawn care individuals meet all the tests and therefore are not considered employees for UI or WC.

Example F – Accountancy Firm

- An accounting firm offers routine bookkeeping services to its' clients, charging a monthly fee.
 - Accounting firm facts:
 - Has already been found liable for UI,
 - Two of their staff bookkeepers who performed these services for them has left to form their own LLC,
 - Continue to utilize their services for the same work that the bookkeepers did prior to their forming their own LLC
 - Bookkeeper LLC facts:
 - Hired a part-time office manager & began building a client base,
 - Has already been found liable for UI,
 - Filed exclusions from workers' compensation coverage,
 - Have complete direction and control over their work for the Accounting firm

Example F - The Bookkeeper LLC

UI-ABC test (<i>Must meet all 3</i>)			WC “two-part” test – (Must meet both)		
A	Right to Control	n/a	1.	Right to Control	✓
Although the bookkeepers of the LLC have complete direction and control over the means and manner of the work they do, the Accounting firm is ultimately responsible for their client’s work and would fail for UI purposes, except their LLC is already liable for UI and therefore the ABC Test is not applied. For WC purposes, they pass.					
B	Outside course/places of business	n/a	2.	Outside course of business	X
Providing bookkeeping services is part of what the Accountancy firm does. Although they now use indirect rather than direct employees to perform this work, it’s an integral part of their business. This again would not pass for UI, except for their UI liability as above. This part of the test is <u>not</u> met for WC.					
C	Independently established (UI account and/or other clients before/during/after)	n/a			
This part of the UI test would have passed, but again because of their UI liability it is not applicable. This test does not apply to WC.					

As the Bookkeeper LLC is liable for UI coverage the ABC Test is not applicable. The bookkeeper members of the LLC may pass “right to control”, however, fail the second part of the test for WC purposes.



Example G – Automobile Dealer

- An automobile dealer sometimes uses retirees to drive vehicles back from auction.
 - Automobile Dealer facts:
 - Is an LLC with a couple of employees
 - Is registered with the UI program
 - Retiree facts:
 - May be friends of the Automobile Dealer who and helps out from time to time when the dealer attends an auction
 - Are happy to drive cars back from auction in exchange for occasional oil change and/or the give breakfast that Auto Dealer springs for each time.
 - Have no employees of their own

Example G – The Automobile Dealer

UI-ABC test (<i>Must meet all 3</i>)			WC “two-part” test – (Must meet both)		
A	Right to Control	X	1.	Right to Control	X

Again, although the Drivers are experienced, have unblemished driving records/licenses, and may take any route to get the vehicle to it's destination, the vehicle is the property of the Dealer and the Dealer is ultimately responsible for the vehicle's safe delivery. Therefore this part of the test is not met for UI or WC.

B	Outside course/places of business	X	2.	Outside course of business	X
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As the nature of the Automobile Dealer's business is buying and selling vehicles and getting those vehicles back to their place of business is part of that process, the Drivers do not meet this part of the test for either UI or WC.

C	Independently established (UI account and/or other clients before/during/after)	X			
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The Drivers have no employees of their own, are individuals, are not in business, do not file tax returns as a business, and are not registered with VDOL. Accordingly, they do not meet this part of the UI test.

As the Drivers fail all parts of the respective tests, they are employees for UI and WC.



Example H – Automobile Dealer

- A high school student in the neighborhood stops by sometimes to help clean snow off vehicles, wash cars, run errands, etc.
 - Automobile Dealer facts:
 - Is a sole-proprietorship with no employees
 - Is not currently liable under the UI program
 - Student facts:
 - Just helps out for something to do and to learn a little about cars
 - Has no employees

Example H – The Automobile Dealer

UI-ABC test (<i>Must meet all 3</i>)			WC “two-part” test – (Must meet both)		
A	Right to Control	X	1.	Right to Control	X

When the student comes around the Automobile Dealer lets him/her do odd jobs and/or errands around the business. Any of those tasks are directly by the Dealer and subsequently the Student does not meet this part of either test.

B	Outside course/places of business	X	2.	Outside course of business	X
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As all the task are directly related to the employer’s business and on the employer’s place of business, this test is also not met for either UI or WC.

C	Independently established (UI account and/or other clients before/during/after)	X			
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The Students are not in business for themselves and fail this part of the UI test.

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The Students are employees for both UI and WC.



Central Office Contacts

- Stephen Monahan, Workers' Comp and Safety Director
 - stephen.monahan@state.vt.us
 - 802-828-2138
- Tracy Phillips, Unemployment Insurance & Wages Director
 - tracy.phillips@state.vt.us
 - 802-828-4242